

FILED

JUL 30 2004

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

NEWPORT AERONAUTICAL SALES
1542 Monrovia Avenue
P.O. Box 1845
Newport Beach, CA 92663
714-574-4100

Plaintiff,

v.

DEPARTMENT OF THE AIR FORCE

Defendant

CASE NUMBER 1:04CV01283

JUDGE: Gladys Kessler

DECK TYPE: FOIA/Privacy Act

DATE STAMP: 7/30/2004

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COMPLAINT

1. This is an action to order the production of agency records, consisting of unclassified technical data needed by the plaintiff's clients to compete for Air Force, other Department of Defense ("DoD") contracts and licensed foreign military sales to our allies. It is brought under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

Jurisdiction

2. This Court has jurisdiction of this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

The Parties

3. Plaintiff, Newport Aeronautical Sales ("NAS"), is a corporation with its principal place of business in Newport Beach, CA.

4. The Defendant Department of the Air Force has possession of the records Plaintiff seeks.

5. NAS is a commercial technical data library.

6. Government owned technical data is needed to bid on or perform DoD contracts and licensed requirements for our allies. One of the greatest barriers to small business participation in the procurement process is accessing data from DoD Data Repositories. Such barrier has resulted in unnecessary sole source procurements that have cost DoD and our allies billions of dollars.

7. Commercial technical data libraries make technical data available to *qualified U.S. contractors entitled to receive it* on an overnight basis. Air Force data repositories often take months.

8. Overnight access to data by NAS' clients has increased small business participation and facilitated competition.

9. DoD has designated NAS a *qualified U.S. contractor* entitled to receive data covered by DoD Directive 5230.25.

10. NAS obtains its technical data from the Air Force and other agencies by submitting FOIA requests and requests under DoD Directive 5230.25.

10 U.S.C. § 130 and DoD Directive 5230.25

11. 10 USC 140c was enacted as § 1217 of the DoD Authorization act for FY 1984 and subsequently recodified as 10 U.S.C. § 130.

12. 10 U.S.C. § 130: (a) *permits DoD to withhold* from public disclosure any technical data with military or space application *if such data may not be exported lawfully without an approval, authorization or license*; (b) *prohibits withholding* pursuant to its provisions if export regulations authorize the export of such data pursuant to a general unrestricted license or exemption; and (c) required DoD to promulgate implementing regulations.

13. The DoD rulemaking effort resulted in the promulgation of DoD Directive 5230.25.

14. DoD rulemakers recognized the important role of commercial technical data services in the procurement process. As stated in the *Federal Register* notice accompanying the rule: 49 *Federal Register* 48040 at page 48041, December 10, 1984.

... The rule ... permits the dissemination of data covered by these limitations to so-called "data brokers," who request such data for purpose of resale, provided, however, such "data brokers" agree in advance to limit such resales to DoD contractors who have already make [sic] the written commitments, referred to above, to the Department of Defense.

The Department believes this course of action ensures that such technical data, relating to militarily critical technologies, will remain subject to export control limitations, while at the same time providing a means for U.S. companies, both large and small, to continue to obtain it, without burdensome constraints, for purposes of bidding or performing on Government contracts, and, in appropriate circumstances, for other purposes.

15. The coverage of DoDD 5230.25 is limited to technical data that:

- ***"disclose critical technology with military or space application.*** For purposes of making this determination, the *Militarily Critical Technologies List (MCTL)* ... shall be used as general guidance"; [¶ 5.2.2]
- requires ***"an approval, authorization, or license for export*** under E.O. 12470 ... or the Arms Export Control Act"; [¶ 5.2.1] and
- ***"may not be exported pursuant to a general, unrestricted license ... or exemption."*** ¶ 5.2.1

Emphasis added.

16. DoDD 5230.25, ¶ 3.2.2, authorizes release of covered data to firms designated as *qualified U.S. contractors* if "[s]uch data are needed to bid or perform on a contract with the Department of Defense, or other U.S. Government Agency, or for other legitimate business purposes". Footnote 2 advises "This does not require a contract with or grant from the U.S. Government." [¶ 3.2.2, n.2]

17. DoDD 5230.25, ¶ 5.4.3 permits withholding from a qualified U.S. contractor for other than bidding or performing a U.S. Government contract “ . . . if it has been determined by the DoD Component focal point . . . that the significance of such data for military purposes is such that release for purposes other than direct support of DoD-approved activities may jeopardize an important technological or operational military advantage of the United States.”

18. As a result of Congressional concerns, DoD was required to provide a list of the *direct support* technologies to both Houses of Congress within six months after its issuance. Under Secretary of Defense James P. Wade, Jr. issued a 22 March 1985 Memorandum directing the Air Force to forward its “ . . . list, together with appropriate background and explanatory information” to DoD by April 19, 1985.

19. January 16, 1985 DoD “Guidelines for Implementation of DOD Directive 5230.25” required the Air Force to notify DoD and consult with the other services prior to designating a technology for “direct DoD support only”. If another service objected, the final determination was to be made by DoD. The purpose behind such requirement was to make sure that DoD components acted consistently in designating “direct DoD support only” technology.

Air Force Implementation

20. AFI 61-204 is the Air Force implementation of 10 U.S.C. § 130.

21. The Air Force promulgated AFI 61-204 without notice and comment rulemaking as required by 5 U.S.C. 553 or a small business impact statement as required by the Small Business Regulatory Flexibility Act, 5 U.S.C. § 601 et seq.

22. AFI 61-204 contains restrictions on the access to data not permissible under the FOIA or DoDD 5230.25.

23. *AFI 61-204 makes the erroneous assumption that all technical data are covered by*

DoDD 5230.25. AFI 61-204 fails to recognize that:

- DoDD 5230.25 applies only to "technical data that disclose critical technology with military or space application";
- DoDD 5230.25 does not permit the withholding of export controlled technical data if such data may be exported "pursuant to a general, unrestricted license . . . or exemption . . ."

24. DoDD 5230.25, ¶ 5.4.3 permits covered data to be withheld from a qualified U.S. contractor for other than direct support if it has been determined that such disclosure ". . . may jeopardize an important technological or operational military advantage of the United States." Although this requirement is reflected in AFI 61-204, ¶ 4.6, Air Force components have apparently determined that all technical data fall within this category.

NAS Data Requests

25. For many years Air Force personnel have requested that NAS submit its requests under DoDD 5230.25 rather than the FOIA even though the data are not covered by the Directive.

26. Beginning in July 2001, the Air Force began denying NAS requests submitted under DoDD 5230.25. The requested data are not subject to DoDD 5230.25, much less the narrow class of such data that can be withheld for other than direct support.

27. NAS resubmitted its requests under the Freedom of Information Act.

28. NAS submitted various FOIA requests for to the Oklahoma City Air Logistics Center (OC-ALC) in calendar year 2003. Such requests include FOIA case numbers 2003-053, 2003-178, 2003-0240, 2003-0241, 2003-0360, 2003-0365, 2004-0009, 2004-0015, 2004-0044.

29. OC-ALC has not responded to these requests.

30. The data requested by NAS are not subject to DoDD 5230.25 and are required to be released under the FOIA.

31. Virtually all of the requested data are for 30 year old aircraft.

32. Such technical data do not include critical technology with military or space application.

33. DoDD 5230.25, ¶ 5.2.2 requires that the Militarily Critical Technologies List ("MCTL") be used in determining whether data contains critical technology. The data requested by NAS does not depict critical technology.

34. DoDD 5230.25, ¶ 4.1 provides that, "technical data may not be withheld under this section if regulations . . . authorize the export of such data pursuant to a general, unrestricted license or exemption . . ."

35. The Air Force and other agencies previously released much of the data requested by NAS without restriction. Such data are in the public domain and therefore can be exported pursuant to a general license under the International Traffic in Arms Regulations ("ITAR"), 22 CFR § 125.4(b)(13).

36. In order to withhold technical data from a qualified U.S. contractor for other than bidding on or performing a U.S. contract, there must be a determination that release "may jeopardize an important technological or operational military advantage of the United States."

37. The data requested by NAS do not reflect technologies of the type on the MCTL, much less the narrow subset of technologies on the MCTL data that can be withheld from a qualified U.S. contractor.

38. Other DoD components routinely provide NAS technical data depicting the same technologies as that in the technical data withheld by the Air Force.

39. NAS has a right of access to the requested data under 5 U.S.C. § 552. There is no legal basis for defendant's denial of such access.

WHEREFORE, plaintiff prays that this Court:

- (1) Order defendant to promptly release the requested technical data;
- (2) Declare AFI 61-204 to be contrary to law;
- (3) Award plaintiff its costs and reasonable attorneys fees in this action pursuant to 5 U.S.C. §552(a)(4)(E) and/or the Equal Access to Justice Act, 28 U.S.C. § 2412(d);
- (4) Issue a written finding pursuant to 5 U.S.C. § 552 (a)(4)(F), that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding; and
- (5) Grant such other relief as the Court may deem just and proper.

Respectfully submitted,

SEIDMAN & ASSOCIATES, P.C.

Dated:

July 30, 2004

by:

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